

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EDWARD C. GREEN,  
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
Defendant.

No. CV-08-3003-CI

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 27, 30.) Attorney D. James Tree represents Edward Green (Plaintiff); Special Assistant United States Attorney Richard Rodriguez represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

**JURISDICTION**

Plaintiff protectively filed for disability benefits (DIB) and Supplemental Security Income (SSI) benefits on March 24, 2004, alleging disability due to depression and an onset date of August 26, 2002 (as amended). (Tr. 63, 67, 315, 353.) His claim was

1 denied initially, and on reconsideration. Plaintiff requested a  
2 hearing before an administrative law judge (ALJ), which was held on  
3 September 22, 2006, before ALJ Riley Atkins; a telephonic  
4 supplemental hearing was held on April 30, 2007. (Tr. 333-55, 356-  
5 82.) Plaintiff, who was represented by counsel, and vocational  
6 expert Barbara Vogel (VE) testified. (Tr. 356, 362.) The ALJ  
7 denied benefits on June 1, 2007; the Appeals Council denied review.  
8 (Tr. 15-25, 5-8.) The instant matter is before this court pursuant  
9 to 42 U.S.C. § 405(g).

#### 10 STATEMENT OF THE CASE

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings, and are briefly summarized here. At the time of the  
13 first hearing, Plaintiff was 52 years old with a high school  
14 education and one year of college. (Tr. 337.) He was divorced and  
15 had one son who had died at the age of 20 about five years before  
16 the hearing and a daughter who lived in western Washington. (Tr.  
17 339.) Plaintiff's father had died in April 2003, and at the time of  
18 the hearing, Plaintiff was living with his mother in her house.  
19 (Tr. 190, 352.) Plaintiff had past work experience as a restaurant  
20 manager, cook, cashier, and tree thinner. (Tr. 363.) He testified  
21 his depression, which had worsened since his son died, prevented him  
22 from working because of fatigue, inability to concentrate, and lack  
23 of motivation. (Tr. 338, 344.) He testified he used to use  
24 marijuana "once or twice a month, or every couple of months," had  
25 tried methamphetamine two times, and last used marijuana seven or  
26 eight months ago. (Tr. 341-42.) He stated he had not been in drug  
27 treatment. (*Id.*) He received mental health counseling and  
28

1 prescribed medication for his mental health problems. (Tr. 349-50.)

2  
3 **ADMINISTRATIVE DECISION**

4 The ALJ found Plaintiff was insured for DIB purposes through  
5 December 31, 2003. (Tr. 17.) At step one, ALJ Atkins found  
6 Plaintiff had not engaged in substantial gainful activity since  
7 August 26, 2002, the amended alleged onset date. (*Id.*) At step  
8 two, he found Plaintiff had severe impairments of "major depressive  
9 disorder (recurrent and mild to severe); personality disorder (not  
10 otherwise specified); and a history of alcohol and cannabis abuse in  
11 claimed remission." (*Id.*) He determined at step three these  
12 impairments did not meet or medically equal one of the listed  
13 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4  
14 (Listings). (Tr. 18.) The ALJ found Plaintiff's allegations of  
15 symptoms and limitations were not entirely credible. (Tr. 22.) At  
16 step four, he determined Plaintiff had the following residual  
17 functional capacity (RFC):

18 [T]he claimant's residual functional capacity is  
19 restricted by nonexertional limitations. He does not have  
20 any exertional limitations. He is able to remember  
21 locations and work-like procedures. He has the ability to  
22 understand, remember and carry out simple and detailed  
23 instructions. His ability to maintain attention and  
24 concentration for extended periods is unlimited. His  
25 ability to perform activities within a schedule, maintain  
26 regular attendance, and be punctual within customary  
27 tolerances is moderately limited. He has no significant  
28 limitation affecting his ability to sustain an ordinary  
routine without special supervision, work in coordination  
with or proximity to others without being distracted by  
them, and make simple work-related decisions. His ability  
to complete a normal workday and workweek without  
interruptions from psychologically based symptoms and to  
perform at a consistent pace without an unreasonable  
number and length of rest periods is moderately limited.  
He has a moderate limitation with respect to his ability  
to interact appropriately with the general public. He has

1 no significant limitation in his ability to ask simple  
2 questions or request assistance. His ability to accept  
3 instruction and respond appropriately to criticism from  
4 supervisors is moderately limited. His ability to get  
5 along with coworkers or peers without distracting them or  
6 exhibiting behavioral extremes is not significantly  
7 limited. His ability to maintain socially appropriate  
8 behavior and to adhere to basic standards of neatness and  
9 cleanliness is not significantly limited. He has no  
10 significant limitation within the functional category of  
11 adaption.

12 (Tr. 19.)

13 Considering vocational expert testimony and the record in its  
14 entirety, the ALJ concluded Plaintiff could perform his past  
15 relevant work as a tree thinner and a cook. (Tr. 24.) Proceeding  
16 to step five, the ALJ made alternative findings that Plaintiff could  
17 perform other jobs in the national economy; therefore, Plaintiff was  
18 not found to be under a "disability" as defined by the Social  
19 Security Act. (*Id.*)

#### 20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
22 court set out the standard of review:

23 A district court's order upholding the Commissioner's  
24 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
25 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
26 Commissioner may be reversed only if it is not supported  
27 by substantial evidence or if it is based on legal error.  
28 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
Substantial evidence is defined as being more than a mere  
scintilla, but less than a preponderance. *Id.* at 1098.  
Put another way, substantial evidence is such relevant  
evidence as a reasonable mind might accept as adequate to  
support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th

1 Cir. 1995). The ALJ's determinations of law are reviewed  
2 *de novo*, although deference is owed to a reasonable  
3 construction of the applicable statutes. *McNatt v. Apfel*,  
4 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 5 SEQUENTIAL PROCESS

6 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
7 requirements necessary to establish disability:

8 Under the Social Security Act, individuals who are  
9 "under a disability" are eligible to receive benefits. 42  
10 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
11 medically determinable physical or mental impairment"  
12 which prevents one from engaging "in any substantial  
13 gainful activity" and is expected to result in death or  
14 last "for a continuous period of not less than 12 months."  
15 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
16 from "anatomical, physiological, or psychological  
17 abnormalities which are demonstrable by medically  
18 acceptable clinical and laboratory diagnostic techniques."  
19 42 U.S.C. § 423(d)(3). The Act also provides that a  
20 claimant will be eligible for benefits only if his  
21 impairments "are of such severity that he is not only  
22 unable to do his previous work but cannot, considering his  
23 age, education and work experience, engage in any other  
24 kind of substantial gainful work which exists in the  
25 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
26 the definition of disability consists of both medical and  
27 vocational components.

28 In evaluating whether a claimant suffers from a  
disability, an ALJ must apply a five-step sequential  
inquiry addressing both components of the definition,  
until a question is answered affirmatively or negatively  
in such a way that an ultimate determination can be made.  
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
claimant bears the burden of proving that [s]he is  
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
1999). This requires the presentation of "complete and  
detailed objective medical reports of h[is] condition from  
licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
2 Nevertheless, a decision supported by substantial evidence will  
3 still be set aside if the proper legal standards were not applied in  
4 weighing the evidence and making the decision. *Browner v. Secretary*  
5 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
6 there is substantial evidence to support the administrative  
7 findings, or if there is conflicting evidence that will support a  
8 finding of either disability or non-disability, the finding of the  
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
10 1230 (9<sup>th</sup> Cir. 1987).

#### 11 ISSUES

12 The question is whether the ALJ's decision is supported by  
13 substantial evidence and free of legal error. Plaintiff argues the  
14 ALJ erred when he improperly rejected the opinions of examining and  
15 treating medical sources, failed to consider lay testimony and  
16 improperly assessed his credibility. (Ct. Rec. 28 at 14.)

#### 17 DISCUSSION

##### 18 A. Credibility

19 When the ALJ finds a claimant's statements as to the severity  
20 of impairments, pain and limitations are not credible, the ALJ must  
21 make a credibility determination with findings sufficiently specific  
22 to permit the court to conclude the ALJ did not arbitrarily  
23 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,  
24 947 (9<sup>th</sup> Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup>  
25 Cir. 1991) (en banc). If there is no affirmative evidence that the  
26 claimant is malingering, the ALJ must provide "clear and convincing"  
27 reasons for rejecting the claimant's allegations regarding the  
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1 severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
2 1998). The ALJ must engage in a two-step analysis in deciding  
3 whether to admit a claimant's subjective symptom testimony. *Smolen*  
4 *v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996).

5 Under the first step, the ALJ must find the claimant has  
6 produced objective medical evidence of an underlying "impairment,"  
7 and that the impairment, or a combination of impairments, "could  
8 reasonably be expected to produce pain or other symptoms." *Cotton*  
9 *v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup> Cir. 1986) Once the *Cotton* test  
10 is met, the ALJ must evaluate the credibility of the claimant. In  
11 addition to ordinary techniques of credibility evaluation, the ALJ  
12 may consider the following factors when weighing the claimant's  
13 credibility: the claimant's reputation for truthfulness,  
14 inconsistencies either in his allegations of limitations or between  
15 his statements and conduct, daily activities and work record, and  
16 testimony from physicians and third parties concerning the nature,  
17 severity, and effect of the alleged symptoms. *Fair v. Bowen*, 885  
18 F.2d 597, n.5 (9<sup>th</sup> Cir. 1989); *Light v. Social Sec. Admin.*, 119 F.3d  
19 789, 792 (9<sup>th</sup> Cir. 1997). If the ALJ's credibility finding is  
20 supported by substantial evidence in the record, the court may not  
21 engage in second-guessing. See *Morgan*, 169 F.3d at 600; *Fair*, 885  
22 F.2d at 604 ("credibility determinations are the province of the  
23 ALJ").

24 Here, as noted by Plaintiff, there is no conclusive evidence of  
25 malingering. Plaintiff contends the ALJ did not provide legally  
26 sufficient reasons for rejecting his testimony. (Ct. Rec. 28 at  
27 24.) However, a review of the record and the ALJ's credibility  
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1 findings reveals that after discussing Plaintiff's testimony and  
2 statements to third parties, the ALJ gave specific "clear and  
3 convincing" reasons for discounting Plaintiff's credibility. (Tr.  
4 22-23.) Specifically, the ALJ noted Plaintiff complained of being  
5 depressed and fatigued, having difficulties being around others,  
6 having a limited memory and problems with concentration, sleeping  
7 and suicidal ideation. (Tr. 22.) "An ALJ cannot be required to  
8 believe every allegation of disabling pain, or else disability  
9 benefits would be available for the asking, a result plainly  
10 contrary to 42 U.S.C. § 423 (d) (5) (A). . . . This holds true even  
11 where the claimant introduces medical evidence showing that he has  
12 an ailment reasonably expected to produce some pain; many medical  
13 conditions produce pain not severe enough to preclude gainful  
14 employment." *Fair*, 885 F.2d at 603. Subjective complaints alone  
15 cannot be the basis for a finding of disability. Further, the ALJ  
16 need not completely reject nor completely accept the claimant's  
17 allegations. *Social Security Ruling (SSR)* 96-7p.

18 In rejecting the severity of Plaintiff's subjective symptom  
19 complaints, the ALJ discussed multiple inconsistencies in  
20 Plaintiff's reports regarding his drug abuse. (Tr. 22.) A  
21 claimant's inconsistent reports and lack of candor about substance  
22 abuse support adverse credibility findings. *Verduzco v. Apfel*, 188  
23 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999) Specifically, the ALJ noted  
24 Plaintiff's hearing testimony that he had smoked marijuana  
25 habitually one to two times per month, that he last smoked marijuana  
26 in December 2006, and had used methamphetamine a "few times." (Tr.  
27 22, 342.) The ALJ found this testimony conflicted with Plaintiff's  
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1 report to Roland Dougherty, Ph.D., that marijuana use "had never  
2 been a habit," and that he last smoked in 2003, (Tr. 22, 288), and  
3 with reports to Plaintiff's therapist at Eastern State Hospital  
4 (ESH) in 2002, that he had been smoking marijuana several times a  
5 week for twenty years, and had used methamphetamine ten times. (Tr.  
6 22, 141.) These findings are supported by the record, including  
7 the treatment summaries by Drs. Bacalzo and Sarubbi at ESH in May  
8 2002, who treated Plaintiff before he was released to jail for  
9 possession charges. Plaintiff reported to Dr. Bacalzo that he used  
10 in the morning and the evening; he also admitted, contrary to his  
11 hearing testimony, that he started growing marijuana after his son's  
12 death because he "didn't care what happened" to him. (Tr. 128, 130,  
13 132, 141, 341.) Plaintiff also reported drug use since he was 19,  
14 "several times a week until one month ago" to Daniel Ferber, M.D.,  
15 at CWCMMH in June 2002. (Tr. 248.) In June 2004, examining  
16 psychologist, Lawrence Lyon, Ph.D., observed Plaintiff downplayed  
17 his drug use and was evasive about his criminal history. (Tr. 143-  
18 44, 146.) These findings are "clear and convincing" reasons, amply  
19 supported by substantial evidence, to discount Plaintiff's  
20 credibility.

21 Other reasons given by the ALJ in his credibility findings  
22 were: inconsistencies in Plaintiff's reports to third parties about  
23 his criminal history, see e.g. *Fair*, 885 F.2d at n.5 (ordinary  
24 techniques of credibility apply in disability proceedings); non-  
25 compliance with medical treatment; and Plaintiff's activities that  
26 did not reflect a complete inability to work. (Tr. 23.) The  
27 evidence shows Plaintiff's reported activities included watching  
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1 television, reading, doing laundry and cleaning, yard work, cutting  
2 firewood, driving an automobile to shop for groceries several times  
3 a month, caring for his dogs, spending time with friends and some  
4 work as a fishing guide. (Tr. 22, 192, 194.) <sup>1</sup> The ALJ found  
5 Plaintiff also was independent in his personal care and financial  
6 management. (Tr. 22.) This reasoning is supported by the record.

7 For example, Shirley Roffe, M.D., reported in her medication  
8 management review dated March 4, 2004, that Plaintiff did not cancel  
9 or show for scheduled appointments between July 2003 and March 2004.  
10 Plaintiff reported to Dr. Roffe that he had stopped taking his anti-  
11 depressant, for no stated reason. She observed Plaintiff did not  
12 demonstrate a depressed or distressed affect at their appointment.  
13 He requested a new anti-depressant, which was denied pending further  
14 evaluation. (Tr. 208.) Treatment notes from April and May 2004  
15 indicate Plaintiff had resumed medication and reported improved  
16 mood. He also reported he had increased, and then decreased, his  
17 medication, and was doing "odd jobs" in carpentry and painting, was  
18 breeding dogs and had recently sold a litter of puppies. (Tr. 176,  
19 181-84.) Plaintiff's primary therapist, C.J. Burns, MSW, noted  
20 Plaintiff's reinstated medication was improving his depressive  
21 symptoms. (*Id.*)

22 It is also noted on independent review that in May 2002,  
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24 <sup>1</sup> Plaintiff submitted a statement (undated) denying that he  
25 had more than one dog and never was a fishing guide. (Tr. 332.)  
26 However, as discussed in the body of this decision, Plaintiff's  
27 statements to third parties as documented in the record support the  
28 ALJ's findings. (Tr. 147, 176, 181-84, 285.)

1 Plaintiff was observed by ESH physicians as responding well to  
2 medication and therapy to deal with his son's death. (Tr. 136.) In  
3 October 2002, Dr. Ferber reported that Plaintiff had improved in his  
4 depressive mood after resuming treatment, but continued to be tired  
5 during the day. Dr. Ferber observed him as presenting with "bright  
6 affect," smiling, pleasant, and neither depressed nor anxious. (Tr.  
7 213.) Dr. Ferber adjusted Plaintiff's medication to address fatigue  
8 complaints, and assessed his depressive disorder as recurrent and  
9 mild. (*Id.*) In January and April 2003, Plaintiff continued to have  
10 difficulties with depressed mood, exacerbated by the death of his  
11 father in April. (Tr. 211.) By July 2003, Plaintiff reported "good  
12 control of his depressive symptoms." (Tr. 210.) Dr. Ferber observed  
13 "he did not have any symptoms of depression," and adjusted  
14 medication to address complaints of fatigue. (*Id.*)

15 The inconsistencies in the record specifically cited by the  
16 ALJ constitute "substantial evidence" to support the ALJ's finding  
17 that Plaintiff is not credible as to the severity of his symptoms.  
18 The ALJ's credibility determination is a reasonable interpretation  
19 of the evidence. In matters of credibility, where the ALJ's  
20 findings are reasonably supported by substantial evidence, the court  
21 will not substitute its judgment for that of the Commissioner.  
22 *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9<sup>th</sup> Cir. 2001); *Fair*, 885  
23 F.2d at 604.

#### 24 **B. Evaluation of Medical Evidence**

25 Plaintiff claims the ALJ improperly rejected the opinions of  
26 treating and examining physicians, as well as state agency  
27 physicians, all of whom found "marked" limitations in his ability to  
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1 perform work. Plaintiff contends the ALJ erroneously ignored  
2 consistent findings from Dr. Humann, Dr. Lyon, and mental health  
3 therapists Rebecca Twohy and C.J. Burns in favor of Dr. Dougherty's  
4 opinions. (Ct. Rec. 28 at 18 .)

5 1. Acceptable Medical Sources

6 In a disability proceeding, it is the role of the ALJ to  
7 resolve conflicts in medical evidence. A treating physician's  
8 opinion is given special weight because of his or her familiarity  
9 with the claimant and his physical condition. See *Fair*, 885 F.2d  
10 at 604-05. If the treating physician's opinion is not contradicted,  
11 it can be rejected only with "clear and convincing" reasons. *Lester*  
12 *v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted, the  
13 ALJ may reject the opinion if he states specific, legitimate reasons  
14 that are supported by substantial evidence. See *Flaten v. Secretary*  
15 *of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995); *Fair*,  
16 885 F.2d at 605. Furthermore, a treating physician's opinion "on  
17 the ultimate issue of disability" must itself be credited if  
18 uncontroverted and supported by medically accepted diagnostic  
19 techniques unless it is rejected with "clear and convincing"  
20 reasons. *Holohan v. Massanari*, 246 F.3d 1195, 1202-03 (9<sup>th</sup> Cir.  
21 2001).

22 To meet this burden, the ALJ can set out a detailed and  
23 thorough summary of the facts and conflicting clinical evidence,  
24 state his interpretation of the evidence, and make findings.  
25 *Thomas*, 278 F.3d at 957; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup>  
26 Cir. 1989). Further, a plaintiff's credibility is an appropriate  
27 factor to consider when evaluating medical evidence. See *Webb v.*

1 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

2 Historically, the courts have recognized conflicting medical  
3 evidence, the absence of regular medical treatment during the  
4 alleged period of disability, and the lack of medical support for  
5 doctors' reports based substantially on a claimant's subjective  
6 complaints of pain as specific, legitimate reasons for disregarding  
7 the treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair*,  
8 885 F.2d at 604. The ALJ need not accept a treating source opinion  
9 that is "brief, conclusory and inadequately supported by clinical  
10 findings." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1044-45 (9<sup>th</sup> Cir.  
11 2007) (*citing Thomas*, 278 F.3d at 957). Where an ALJ determines a  
12 treating or examining physician's stated opinion is materially  
13 inconsistent with the physician's own treatment notes, legitimate  
14 grounds exist for considering the purpose for which the doctor's  
15 report was obtained and for rejecting the inconsistent, unsupported  
16 opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996).  
17 "Although a treating physician's opinion is generally afforded the  
18 greatest weight in disability cases, it is not binding on an ALJ  
19 with respect to the existence of an impairment or the ultimate  
20 determination of disability. *Batson v. Commissioner of Soc. Sec.*  
21 *Admin.*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004) (*quoting Tonapetyan v.*  
22 *Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001).

23 The Regulations also provide that the final determination  
24 regarding a claimant's ability to perform basic work is the sole  
25 responsibility of the Commissioner. 20 C.F.R. §§ 404.1546, 416.946;  
26 SSR 96-5p (RFC assessment is an administrative finding of fact  
27 reserved to the Commissioner). No special significance is given to  
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1 a medical source opinion on issues reserved to the Commissioner. 20  
2 C.F.R. §§ 404.1527(e), 416.927(e).

3 In his summary of the evidence and RFC assessment, ALJ Atkins  
4 thoroughly discussed evidence from the attending psychiatrists and  
5 social worker at ESH, physicians and mental health therapists at  
6 Central Washington Comprehensive Mental Health Center, (CWCMMC),  
7 examining psychologists Dr. Lyon and Dr. Dougherty and non-examining  
8 State agency psychologists. (Tr. 19-22.) He gave little weight  
9 to findings in the psychological evaluation completed by CWCMMC  
10 psychiatrist Kimberly Humann, M.D., dated August 17, 2006. (Tr.  
11 21.) The ALJ noted that Dr. Humann identified "multiple marked and  
12 severe limitations" that precluded Plaintiff from working. (Tr. 21,  
13 267-72.) She opined that Plaintiff could not tolerate work tasks or  
14 work with others. (Tr. 272.) The ALJ found the severity indicated  
15 was inconsistent with the record as a whole, with Dr. Humann's  
16 treatment notes that medication was effective, and with  
17 Plaintiff's reported improvement in energy and motivation. (Tr. 21,  
18 285.) These are legally sufficient reasons supported by substantial  
19 evidence throughout the record.

20 As noted by the ALJ, Dr. Humann's own treatment notes are  
21 inconsistent with the limitations assigned in August 2006. Dr.  
22 Humann first treated Plaintiff in February 2006. (Tr. 280.) She  
23 states in her initial report that "patient returns for medication  
24 management after discontinuing anti-depressants a year ago due to  
25 frustration over side effects." (*Id.*) Plaintiff reported to Dr.  
26 Humann that the medications prescribed were effective and once he  
27 stopped them, depressive symptoms recurred. (*Id.*) In July 2006,  
28

1 however, Dr. Humann treatment notes indicate Plaintiff's depressive  
2 episode was "resolving with current medication." (Tr. 285.) Dr.  
3 Humann reported Plaintiff's mood was "less down, even up at times,"  
4 he was participating in and enjoying activities such as water  
5 skiing, fishing, socializing, was "easily engageable," and exhibited  
6 "bright affect." (Tr. 285.) The ALJ did not err in rejecting the  
7 severity assessed in Dr. Humann's August 2006 mental RFC assessment.  
8 (Tr. 270-72.)

9 The record also includes reports from ESH psychiatrists and  
10 other CWCMH psychiatrists (Dr. Roffe and Dr. Ferber) that conflict  
11 with Dr. Humann's assessment. In May 2002, Drs. Bacalzo and Sarubbi  
12 noted that Plaintiff was beginning to deal with the loss of his son,  
13 was responding well to medication and gave Plaintiff a fair to good  
14 prognosis at discharge from ESH. At discharge, Plaintiff was  
15 assessed as "markedly improved," and returned to jail. (Tr. 130,  
16 133.) Significantly, Dr. Ferber, a treating psychiatrist at  
17 CWCMHC, examined Plaintiff in June 2002, when Plaintiff was on  
18 antidepressants as prescribed by the ESH physicians. (Tr. 248.) He  
19 diagnosed depressive disorder, NOS, and cannabis abuse. He stated  
20 "It is unclear to what extent Ed's marijuana use has contributed to  
21 his ongoing depressive difficultness. Since being hospitalized at  
22 Eastern State Hospital and having his Effexor XR dosage increased,  
23 he is not endorsing any problems with depressed mood or suicidal  
24 ideation, but continues to have problems with sleep." (Tr. 250.)

25 In treatment notes for 2003 and 2004,<sup>2</sup> Plaintiff's providers  
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27 <sup>2</sup> Besides the gap in medication treatment noted by Dr. Humann,  
28 there appears to be a gap in medication management between July 2003

1 consistently reported improvement in mood when Plaintiff took his  
2 medication. They noted increased self-reported activities, such as  
3 cutting wood, mushroom picking, and doing odd jobs. (Tr. 180-81,  
4 193-95, 210-11, 231.) In March 2004, Plaintiff met with CWCMMHC  
5 psychiatrist, Dr. Roffe, for a medication management appointment.  
6 As discussed above, Plaintiff admitted he had stopped taking anti-  
7 depression medications prescribed in July 2003 by Dr. Ferber. Dr.  
8 Roffe observed Plaintiff exhibited "no affect that appeared  
9 depressed or distressed." (Tr. 208.) These reports do not support  
10 Dr. Humann's rejected opinions.

11 Finally, the ALJ also rejected Dr. Humann's opinions because  
12 she did not consider issues of credibility in her evaluation of  
13 Plaintiff's self-reported symptoms. (Tr. 21.) The ALJ did not err  
14 in his consideration of the entire record, and it is reasonable that  
15 he would discount Dr. Humann's severity assessment in light of  
16 objective test results that indicate exaggeration of symptoms. As  
17 discussed above, treatment notes generally reflect improvement when  
18 Plaintiff was complying with his medication and reports of daily  
19 activities inconsistent with an inability to work. The ALJ did not  
20 err in giving little weight to Dr. Humann's conclusions regarding  
21 Plaintiff's total inability to perform work tasks.

22 \_\_\_\_\_  
23 (when he reported good control of his depressive symptoms to Dr.  
24 Ferber) and January 2004 (when he met with Mr. Burns and requested  
25 an antidepressant). (Tr. 189, 210.) In March 2004, Plaintiff had  
26 a medication management appointment with CWCMMHC psychiatrist Dr.  
27 Shirley Roffe, and resumed treatment with Lexapro soon after this  
28 appointment. (Tr. 208, 210.)

1       Regarding Dr. Lyon, Plaintiff relies on a finding of "GAF  
2 (current)" of 45 assigned by Dr. Lyon in June 2004, as conclusive  
3 proof of his disability. (Ct. Rec. 28 at 20; Tr. 147.) This  
4 reliance is misplaced. The Global Assessment of Functioning (GAF)  
5 scale is a common tool for tracking and evaluating the overall  
6 psychological functioning of a patient at a specific time. The  
7 Commissioner has explicitly disavowed any use of the GAF scores as  
8 an indicator of disability. In August 2000, the Commissioner, in  
9 discussing comments to the current mental disorder evaluation  
10 regulations, stated that "[t]he GAF scale . . . does not have a  
11 direct correlation to the severity requirements in our mental  
12 disorder listings." 65 Fed. Reg. 50746-01, 50765 (August 21,  
13 2000). (Available at 2000 WL 1173632.)

14       Dr. Lyon observed Plaintiff's evasiveness regarding drug use  
15 and legal problems, but found him generally "candid regarding his  
16 symptomatology." (Tr. 146.) Plaintiff reported his mood as "down,"  
17 energy low, with crying spells when thinking of his deceased son.  
18 (Tr. 146.) He also reported his father had died a year ago, and he  
19 was living with his mother. He reported gathering wood, feeding the  
20 dogs and maintaining the house, but very little socialization. (Tr.  
21 147.) He reported taking Lexapro for his depression. (Tr. 145.)  
22 Dr. Lyon diagnosed Major Depressive Disorder, single episode,  
23 severe. (Tr. 147.) As found by the ALJ, Dr. Lyon's evaluation and  
24 GAF score is based entirely on a review of the records and  
25 Plaintiff's unreliable self-report. The ALJ gave legally sufficient  
26 reasons for giving little weight to Dr. Lyon's findings, and  
27 properly rejected the GAF scores as unreliable and of little value

28

1 in the determination of disability. (Tr. 22.)

2 2. Dr. Dougherty's Consultative Examination

3 Plaintiff argues in his brief, and argued at the hearing, that  
4 it was unnecessary to order a consultive examination after the  
5 hearing. He objected to the ALJ's decision to send Plaintiff to an  
6 out of town psychologist, Dr. Dougherty, when there were qualified  
7 psychologists closer to Plaintiff's home. He also suggests the  
8 consultative evaluation was not reliable because of Dr. Dougherty's  
9 "reputation." (Ct. Rec. 28 at 20 n.3.) There is no evidence in the  
10 record to support such a suggestion.

11 It is within the ALJ's discretion to develop the record if  
12 additional evidence is necessary to resolve a conflict or clear up  
13 any ambiguity in the record. *Mayes v. Massanari*, 276 F.3d 453, 459-  
14 60 (9<sup>th</sup> Cir. 2001) Here, before Dr. Dougherty submitted his  
15 evaluation, there were no reports based on objective testing;  
16 Plaintiff was diagnosed and treated based on his self-reported  
17 symptoms. As discussed above, inconsistencies in the Plaintiff's  
18 reports raised issues of credibility. It was reasonable for the ALJ  
19 to order a new evaluation that included objective testing to assess  
20 Plaintiff's credibility and better evaluate the evidence. See 20  
21 C.F.R. §§ 404.1519a(a), 416.919a(a). Dr. Dougherty's findings,  
22 unlike those of the treating, examining, and non-examining  
23 psychologists in the record, were based on objective test results  
24 that showed exaggeration of symptoms. (Tr. 295, 298-311 (Minnesota  
25 Multiphasic Personality Inventory results).) The ALJ considered and  
26 overruled Plaintiff's attorney's objection to Dr. Dougherty's report  
27 at the second hearing. He found there was no evidence that the  
28

1 selection of a consulting expert was based on outcome. (Tr. 359-  
2 61.) That ruling is affirmed.

3 Whether the exaggeration of symptoms reflected in Plaintiff's  
4 test results was due to malingering or "a cry for help," (Tr. 295),  
5 the findings of unreliability are based on objective testing. The  
6 ALJ did not err in considering these findings in his sequential  
7 evaluation. It is also noted that Dr. Dougherty's diagnosis of  
8 depressive disorder is consistent with treating physician opinions  
9 and Plaintiff's treatment records. Further, the ALJ did not rely  
10 totally on Dr. Dougherty's conclusions. Rather, he factored in the  
11 results of objective psychological testing into his evaluation of  
12 the entire record. The ALJ gave great weight to the review and  
13 findings of agency psychologist, Dr. Deborah Baldwin, in her  
14 detailed review of the records and mental RFC assessment, dated July  
15 2004. <sup>3</sup> (Tr. 20, 168-74.) Dr. Baldwin clearly considered  
16 credibility issues that were considered by the ALJ. (Tr. 171, 174.)  
17 She also had the advantage of reviewing Plaintiff's longitudinal  
18 treatment history in her assessment, which is consistent with Dr.  
19 Ferber's (a treating psychiatrist) July 2003 report, treatment notes  
20 from Dr. Humann, and treatment notes from Mr. Burns after Plaintiff  
21 resumed consistent medication treatment. The ALJ did not err in  
22 relying in Dr. Baldwin's assessment. *Lester*, 81 F.3d at 830-31.

23 \_\_\_\_\_  
24 <sup>3</sup> The state agency medical source evaluations are treated as  
25 expert opinion evidence of non-examining sources by the ALJ, who can  
26 give weight to these opinions only insofar as they are supported by  
27 evidence in the case record. The ALJ cannot ignore these opinions  
28 and must explain the weight given. *SSR* 96-6p.

1        3.    Non-Medical Sources

2        Non-medical sources are considered "other sources" under the  
3 Regulations and include nurse practitioners, physicians' assistants,  
4 therapists, teachers, social workers, spouses and other non-medical  
5 sources.    20 C.F. R. §§ 404.1513(d), 416.913(d).    Non-medical  
6 testimony can never establish a diagnosis or disability absent  
7 corroborating competent medical evidence. *Nguyen*, 100 F.3d at 1467.  
8 More weight is given to the opinions of a non-examining medical  
9 source than that of a non-medical source.    20 C.F.R. § 404.1527;  
10 *Gomez v. Chater*, 74 F.3d 967, 970-71 (9<sup>th</sup> Cir. 1996).    However, the  
11 ALJ is required to "consider observations by non-medical sources as  
12 to how an impairment affects a claimant's ability to work."  
13 *Sprague*, 812 F.2d at 1232.    Pursuant to *Dodrill v. Shalala*, 12 F.3d  
14 915, 919 (9<sup>th</sup> Cir. 1993), an ALJ is obligated to give reasons germane  
15 to "other source" testimony before discounting it.

16        The psychological evaluations relied upon by Plaintiff, (see  
17 Ct. Rec. 28 at 18), were completed by mental health therapists  
18 Rebecca Twohy and C.J. Burns and are dated December 2003, April  
19 2003, February 2003 and August 2002.    (Tr. 215-18, 222-25, 229-32,  
20 242-45.)    As therapists, their testimony alone cannot establish  
21 disability.    Further, contrary to Plaintiff's assertion that the  
22 ALJ failed to mention their opinions, the ALJ specifically  
23 referenced their evaluations <sup>4</sup> and rejected them because they were

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24  
25        <sup>4</sup>        Although the ALJ mistakenly identified the CWCMMC  
26 therapists' evaluations as "performed by the State of Washington's  
27 Department of Social and Health Services," presumably because the  
28 reports are on agency forms, the Exhibits and page numbers

1 not supported by objective evidence (i.e. psychological testing),  
2 they were not consistent with the record in its entirety, and they  
3 conflicted with reported daily activities, conservative treatment  
4 history and Dr. Dougherty's recent evaluation. (Tr. 21-22.) These  
5 reasons are germane to the therapists, and the weight given is  
6 consistent with the Regulations. For example, their assessed  
7 limitations conflict significantly with Dr. Ferber's (a CWCMMC  
8 treating psychiatrist) narrative report dated July 15, 2003, in  
9 which he observed Plaintiff. At that time, Plaintiff self-reported  
10 "good control" of his depressive symptoms with some fatigue due to  
11 his Wellbutrin, he presented with a "bright affect" and did not  
12 exhibit depression symptoms. (Tr. 210, 216-17, 222-23.) The ALJ  
13 did not err in his evaluation of the therapists' reports.

14 It is well-settled that the ALJ is "responsible for determining  
15 credibility, resolving conflicts in medical testimony and for  
16 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.  
17 at 400; *Andrews*, 53 F.3d at 1039; *SSR* 96-8p. Considering  
18 Plaintiff's impugned credibility and the record in its entirety, the  
19 evidence reasonably supports the ALJ's evaluation of the medical  
20 evidence. See *SSR* 96-8p; *SSR* 96-5p (the adjudicator's findings  
21 should be based on all relevant evidence in the case record).

### 22 **C. Lay Testimony**

23 Plaintiff contends the ALJ's rejection of his mother's  
24 statement is not legally sufficient. He also claims the ALJ erred  
25 when he failed to consider expert vocational opinion evidence

26 \_\_\_\_\_  
27 referenced in his decision correspond with the reports from Ms.  
28 Twohy and Mr. Burns in the transcript of proceedings. (Tr. 21-22.)

1 submitted by Plaintiff. (Ct. Rec. 28 at 21-22.) Neither argument  
2 is persuasive. Although lay testimony can never establish  
3 disability absent corroborating competent medical evidence, *Nguyen*,  
4 100 F.3d at 1467, an ALJ is required to consider observations by lay  
5 witnesses regarding the effects of impairments on a claimant's  
6 ability to work. *Sprague*, 812 F.2d at 1232. Moreover, an ALJ is  
7 obligated to give reasons "germane" to a lay witness's testimony  
8 before discounting it. *Dodrill*, 12 F.3d at 919. It is appropriate  
9 to discount lay testimony if it conflicts with medical evidence.  
10 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9<sup>th</sup> Cir. 1984). Here, the  
11 ALJ considered Mrs. Green's written report and found it should be  
12 viewed with caution because of (1) her personal relationship with  
13 the Plaintiff, and (2) her lack of medical expertise. (Tr. 20, 86-  
14 99.) These are acceptable reasons for discounting Mrs. Green's  
15 testimony. See *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9<sup>th</sup> Cir.  
16 2005); *Greger v. Barnhart*, 464 F.3d 968, 972 (9<sup>th</sup> Cir. 2006).

17 In regards to Mr. Wentz's general opinion letter, (Tr. 120-21),  
18 Plaintiff's argument that the ALJ failed to consider this evidence  
19 is misplaced. Plaintiff's representative sent this letter to the  
20 Appeals Council on June 26, 2007, several weeks after the ALJ  
21 rendered his decision. (Tr. 327-28.) Therefore, Mr. Wentz's  
22 opinion was not part of the record before the ALJ, and therefore, it  
23 was not possible for the ALJ to include it in his evaluation.  
24 Further, although it appears the Appeals Council considered the  
25 letter before denying review, (Tr. 4), the Appeals Council is  
26 required to consider new evidence only "if it relates to the period  
27 on or before the date of the administrative law judge hearing  
28

1 decision." 20 C.F.R. §§ 404.970(b), 416.1470(b). In addition, the  
2 Ninth Circuit has held "the Appeals Council is not required to make  
3 any particular evidentiary finding" in rejecting a post-hearing  
4 vocational expert report submitted by Plaintiff. *Gomez*, 74 F.3d at  
5 972.

6 If post-hearing evidence is considered by the Appeals Council,  
7 it is considered part of the record on review by this court.  
8 *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993). If the  
9 new evidence shows there is a reasonable possibility that it would  
10 change the outcome of the ALJ's determination, then remand is  
11 appropriate to allow the ALJ to consider the evidence. Only if the  
12 substantial weight of the evidence is irrefutably clear that the  
13 claimant is disabled, then a remand for benefits is appropriate.  
14 *Mayes*, 276 F.3d at 462.

15 Assuming the Appeals Council considered Mr. Wentz's letter, it  
16 is noted on independent review that Mr. Wentz wrote his opinion  
17 letter in 2003, six months before Plaintiff filed his application  
18 for benefits and three years before the ALJ hearing. (Tr. 120.)  
19 Mr. Wentz did not review Plaintiff's records, and his general  
20 observations are not probative to a disability determination based  
21 on the entirety of Plaintiff's record. In light of the substantial  
22 evidence supporting the ALJ's determination of non-disability,  
23 including hearing testimony by a vocational expert who reviewed  
24 Plaintiff's record and responded directly to the adjudicator's  
25 examination, a reasonable ALJ would not find Plaintiff disabled  
26 based on Mr. Wentz's letter. Mr. Wentz's letter carries little  
27 evidentiary weight and does not merit remand.

**CONCLUSION**

The ALJ thoroughly detailed the medical evidence in the record and properly evaluated medical opinions and other evidence in assessing Plaintiff's ability to perform work activities and past work. His detailed credibility findings are "clear and convincing." His determination of non-disability is based on substantial evidence and free of legal error. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 27**) is **DENIED**;

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 30**) is **GRANTED**;

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED March 20, 2009.

\_\_\_\_\_  
s/ CYNTHIA IMBROGNO

UNITED STATES MAGISTRATE JUDGE